

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RUSSELL VOSTRIRANCKY,

Defendant-Appellant.

UNPUBLISHED

May 22, 2014

No. 313402

Luce Circuit Court

LC No. 2012-001106-FH

Before: STEPHENS, P.J., AND HOEKSTRA AND METER, JJ.

PER CURIAM.

Defendant was found guilty by a jury of failing to register as a sexual offender, MCL 28.729, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to a term of 3 to 15 years' imprisonment. He appeals as of right. Because there was no prosecutorial misconduct and defendant was not denied the effective assistance of counsel, we affirm.

While incarcerated, defendant, a convicted sex offender, was asked to submit a computer scan of his finger and palm prints in order to bring defendant into compliance with the Sex Offender Registration Notification Act (SORA), in particular, MCL 28.727(1)(q). Defendant repeatedly refused, asserting that his prints should already be on file. In discussing why he refused to submit his prints, defendant told authorities that he did not like to be monitored. As a result of his refusal to comply, defendant was charged with, and convicted of, failing to register as a sex offender.

On appeal, defendant argues that the prosecutor's question regarding defendant's prior convictions constituted prosecutorial misconduct because the prior convictions were irrelevant and more prejudicial than probative. Relevant to defendant's argument, at trial, during cross-examination, the prosecutor asked defendant why he had stated that he does not like to be monitored. Defendant responded: "I said I don't – being appreciate [sic] – You keep saying a sex offense. This was a he said/she said, I touched somebody." The prosecutor then asked: "Weren't you convicted of being a predator against four young children?" Defendant replied, "Yes, I was convicted." Defense counsel did not object to the prosecutor's question.

We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). We review claims of prosecutorial misconduct on a

case by case basis, examining the entire record and evaluating a prosecutor's remarks in context. *Id.* at 64. We consider the prosecutor's comments as a whole in light of "defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). "[A] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Brown*, 294 Mich App 377, 383; 811 NW2d 531 (2011).

Defendant challenges the prosecutor's questions regarding defendant's prior convictions as improper under MRE 609 and MRE 404(b). With the exception of certain types of convictions, the admission of a witness's prior conviction for the purpose of attacking the witness's credibility is generally prohibited by MRE 609. However, our Supreme Court in *People v Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985), held that a trial court may admit evidence of a prior conviction if it is "offered for some proper purpose other than to impeach a defendant's credibility in general." For example, MRE 609 does not prohibit the prosecutor from offering evidence of prior convictions in order to refute a defendant's untruthful testimony regarding his prior conviction. *Id.* at 414-417. In comparison, MRE 404(b) prohibits the use of "evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith." MRE 404(b). Although evidence may not be used to show a person's character, where relevant, it may be admissible for other proper purposes, provided that its probative value is not substantially outweighed by its prejudicial effect. MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

Here, the prosecutor's question regarding defendant's prior convictions was not evidence used to attack the defendant's general credibility under MRE 609 or to prove defendant's character contrary to MRE 404(b). Instead, the prosecutor used the evidence to clarify defendant's mischaracterization of his prior conviction as a "he said/she said" issue that was not truly a "sex offense." To prevent defendant's disingenuous testimony in this regard from leading the jury into believing defendant was not required to submit his prints, the prosecutor could offer evidence of his prior convictions to rebut his less than truthful testimony. See *Taylor*, 422 Mich at 414-417. Indeed, the prosecutor had a duty to prove, as one of the elements for the crime charged, that defendant was a convicted sex offender who refused to register. See MCL 28.729.

Moreover, contrary to defendant's arguments, the probative value of defendant's prior conviction was not substantially outweighed by any purported prejudice. MRE 403. The evidence's probative value was high because it tended to prove that the defendant was, in fact, a sex offender who refused to register and it related to the credibility of his testimony. In contrast, any prejudicial effect was negligible, given that defense counsel acknowledged during his opening and closing statements that defendant was a convicted sex offender, other witnesses testified that defendant was a registered sex offender, and, from defendant's own testimony, the jury knew that defendant had been in jail for a "he said/she said" type offense. Overall, on these facts, the evidence was admissible, and the prosecutor did not commit misconduct by asking defendant specifics about his prior convictions.

Defendant also argues that defense counsel was ineffective for failing to file a motion in limine to exclude any mention of defendant's prior conviction or to object on these grounds at trial. To establish the ineffective assistance of counsel, defendant bears the burden of demonstrating: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011) (citation omitted). A defendant has the burden to overcome the presumption that trial counsel performed effectively. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012).

In this case, defendant has not met his burden of establishing that counsel performed deficiently in failing to oppose any reference to his prior convictions. As previously explained, defendant’s prior conviction was not used for general impeachment purposes, but instead was used to elicit an admission from defendant to clarify his misleading statement about his earlier conviction. Moreover, his status as a sex offender was an element of the charged offense. Thus, a motion in limine to exclude any mention of defendant’s prior convictions, or an objection at trial to that effect, would have been futile. Defense counsel cannot be considered ineffective for failing to assert a futile argument. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Given that the evidence was properly admitted at trial, defendant has also not shown that, but for counsel’s performance, there was a reasonable probability of a different outcome. Thus, he has failed to establish that he was denied the effective assistance of counsel.

Finally, defendant argues that defense counsel was ineffective for failing to object to the trial court’s jury instructions, which allowed the jury to consider defendant’s prior conviction to determine whether he was a truthful witness. In relevant part, the trial court’s instruction provided:

There is evidence that the defendant in this matter has been previously convicted of a crime. You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use that prior conviction for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime involved in this case.

A defense counsel’s decisions regarding jury instructions involve matters of trial strategy. *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Relevant to this case, as discussed, our Supreme Court has recognized that evidence of a conviction may be admitted to refute specific testimony. *Taylor*, 422 Mich at 414-417. When this occurs, a cautionary instruction should be given to prevent the use of such as evidence as general impeachment evidence. *Id.* at 415. Similarly, we have approved the use of a cautionary instruction to mitigate the prejudicial effect that other-acts evidence may have on a jury. *People v Orr*, 275 Mich App 587, 593; 739 NW2d 385 (2007). See also MRE 105.

Considering the instruction at issue in this case, we cannot conclude that counsel rendered ineffective assistance in failing to object for the simple reason that the instruction was protective of defendant’s rights. That is, as discussed, the evidence of defendant’s prior convictions was admissible to refute defendant’s mischaracterization of his prior offenses. In this context, the instruction at issue ensured that the jury used the evidence of defendant’s conviction to assess the truthfulness of defendant’s testimony regarding the nature of his offense, and not for improper purposes such as character evidence indicative of a propensity to commit crimes, or as an impeachment of his credibility in general. In short, because the instruction was in fact favorable to defendant, he has not shown counsel’s decision not to object was unreasonable or that, but for counsel’s decision, there was a reasonable probability of a different

outcome. Thus, defendant has not shown the ineffective assistance of counsel and he is not entitled to relief.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter